HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

SEAN B. CUNNINGHAM
DIRECT DIAL: 202 • 778 • 2225
EMAIL: scunningham@hunton.com

March 17, 2011

The Honorable Julius Genachowski
Chairman, Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Notice of Written Ex Parte Communication
WC Docket No. 07-245 ("Pole Attachment Proceeding")
GN Docket No. 09-51 ("National Broadband Plan")

Dear Chairman Genachowski:

On behalf of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (collectively "the Alliance for Fair Pole Attachment Rules" or "the Alliance"),[1] we urge you to reject US Telecom Association's ("USTA") proposal to create a right to regulated pole attachment rates for ILEC attachments on electric utility poles.[2] Instead, the Commission should again acknowledge the plain language of the Communications Act, which expressly excludes ILECs from having any rights as attachers. The Commission has already acknowledged the inescapable conclusion that "[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier … *the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[3] The Commission's conclusion on this question is a matter of reading, not interpretation.

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[1] Together the Alliance's member companies own and maintain approximately 17.6 million electric distribution poles in 18 states, including 12 of the 30 states in which pole attachments are regulated by the FCC.

[2] *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (hereinafter "FNPRM Proceeding"), USTA Ex Parte Letter, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 7, 2011) ("USTA Ex Parte Letter").

[3] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) ("1998 Report and Order") (emphasis added).

In a recent ex parte letter, USTA asserts that the Commission has a "statutory obligation to ensure just and reasonable pole attachment rates, terms, and conditions for all attachers, including Incumbent Local Exchange Carriers."[4] This statement is wrong. As the previous filed comments of numerous parties in this proceeding (including the cable industry) explain, the statute itself provides for exactly the opposite of what USTA claims.[5] The same comments also amply show that, if the Commission were to create pole attachment rights for ILECs in this proceeding, the result would be a windfall for ILECs at the expense of electricity consumers, broadband competition, and the rule of law. To avoid the enormous waste of time and resources that would be expended on litigation leading to reversal of such a decision, the Commission should comply with the law as written and reject USTA's specious proposal.

The Alliance's reply comments in this proceeding explain why USTA's proposal is contrary to the plain language, structure, and legislative history of the Communications Act and why it would also be arbitrary and capricious for the Commission to reverse nearly fifteen years of precedent by creating pole attachment rights for ILECs.[6] A copy of the Alliance's reply comments on this issue are attached. Consistent with those comments, the Alliance hereby submits the following additional comments on the core statutory point that USTA has ignored: the plain language of section 224 precludes the Commission from giving pole attachment rights to ILECs. This letter also briefly explains why there is no good policy reason to ignore the plain language of the statute.

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[4] USTA Ex Parte Letter at 1-2.

[5] FNPRM Proceeding, Reply Comments of the Alliance for Fair Pole Attachment Rules at 80-96 (filed Oct. 4, 2010) ("Alliance Reply Comments"); FNPRM Proceeding, Comments of Edison Electric Institute and the Utilities Telecom Council, at 110-27 (filed Mar. 7, 2008); FNPRM Proceeding, Comments of the Edison Electric Institute and the Utilities Telecom Council at 78-83 (filed Aug. 16, 2010); FNPRM Proceeding, Comments of the Coalition of Concerned Utilities at 130-52 (filed Aug. 16, 2010); FNPRM Proceeding, Comments of Comcast Corporation at 48-49 (filed Mar. 7, 2008).

[6] FNPRM Proceeding, Alliance Reply Comments at 80-96.

I. The plain language of section 224 shows that ILECs have no attachment rights.

A. Congress has spoken: ILECs are excluded.

Under *Chevron v. NRDC*, an agency has discretion to interpret statutory terms only where there is a "gap" in the statutory language.[7] In this case, there is no gap to fill, because Congress has addressed the precise question at issue. Section 224(a)(5) expressly excludes ILECs from the definition of "telecommunications carrier." Section 224(f) requires a utility to provide pole attachment access to "any telecommunications carrier." Because ILECs are not telecommunications carriers under section 224, utilities have no obligation to provide access to ILECs.

Even the ILECs still admit that they have no access rights under 224(f);[8] yet they argue that section 224 nevertheless gives ILECs rights to rates, terms, and conditions of access. They base their argument on section 224(b), which directs the Commission to adjudicate disputes over the rates, terms, and conditions for "pole attachments," which are defined as any attachment by a cable system or a "provider of telecommunications services."[9] Congress has made it clear, however, that *for purposes of section 224*, ILECs are not "providers of telecommunications services."

USTA claims that ILECs are "providers of telecommunications services" even if they are not "telecommunications carriers" for purposes of section 224. According to USTA, Congress's use of two different terms in the same statutory provision must mean that Congress intended that the two terms have different meanings. USTA's argument fails. The plain text of section 224 shows that the term "telecommunications carrier" is synonymous with the term "provider of telecommunications services" and that, accordingly, ILECs are precluded from obtaining regulated pole attachment rates under section 224.

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[7] 467 U.S. 837, 843-44 (1984).

[8] *See, e.g.*, FNPRM Proceeding, Comments of AT&T Inc. at 7 (filed Aug. 16, 2010) ("it is true that the § 225(a)(5) definition of 'telecommunications carrier' expressly excludes ILECs…") ("AT&T Comments").

[9] 47 U.S.C. § 224(b)(1) and (a)(4).

B. Under section 224, "telecommunications carrier" means "provider of telecommunications services" and vice versa.

Section 224(a)(5) expressly provides that, "[f]or purposes of this section, the term 'telecommunications carrier' (*as defined in section 3 of this Act*) does not include any incumbent local exchange carrier …."[10] "Section 3 of this Act" is a cross-reference to the definition of "telecommunications carrier" at section 3(44).[11] Section 224 thus expressly incorporates by reference the plain language of this definition: the words of section 3(44) *are part of the plain language of section 224*.

Section 3(44), in turn, provides:

> (44) TELECOMMUNICATIONS CARRIER.—The term 'telecommunications carrier' *means* any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[12]

Because the term "telecommunications carrier" "*means*" "provider of telecommunications services," the two terms are coextensive and interchangeable: the two terms *mean* the same thing. Because this definition is incorporated into section 224, anything excluded from the defined term is excluded from its equivalent term in the definition. The statute expressly provides for one—and only one—exception. An "aggregator" is a provider of telecommunications services but not a telecommunications carrier. Is any other provider of telecommunications services not a telecommunications carrier? No. Are ILECs somehow providers of telecommunications services without being telecommunications carriers? *A fortiori*, no.

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[10] 47 U.S.C. § 224(a)(5) (emphasis added).

[11] 47 U.S.C. § 153 (44).

[12] *Id*. (emphasis added).

C. "Means" means "means"—no more, no less.

The definition of "telecommunications carrier," as is typical of definitions, uses the word "means" to relate the term being defined to its definition. In a definition, the defined meaning of the term is coextensive with its definition.[13] If term A means B, then A and B are equivalents. When Congress uses the term "means," it signifies an exhaustive definition: if A means B, then A and B are equivalents or, in effect, A = B.[14] In other words, "means" means "means."

Where Congress intends to signify that a defined term has or could have a wider scope, it uses term "includes."[15] By contrast, where Congress intends to exclude a set of entities from the defined term, it creates an exception. In this case, there is only one exception: aggregators are excluded from the definition of "telecommunications carrier." This exclusion implies that there is one—and only one—kind of "provider of telecommunications services" that is not a telecommunications carrier. Any other provider of telecommunications services is, therefore, included. Where a definition expressly provides for an exception, neither the agency nor a reviewing court may infer additional, unstated exceptions to a

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[13] *See generally* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION at § 47:7 (7th ed. 2007) ("A definition which declares what a term 'means,' excludes any meaning that is not stated."). *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, n. 10 (1979) ("As a rule, '[a] definition which declares what a term 'means' . . . exclude[s] any meaning that is not stated.'"); *Leber v. Pennsylvania Dept. of Environmental Resources*, 780 F.2d 372 (3rd Cir. 1986) ("Under accepted rules of statutory construction, '[a] definition which declares what a term 'means' ... excludes any meaning that is not stated.'").

[14] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934) ("where 'means' is employed, the term and its definition are to be interchangeable equivalents ….").

[15] *See*, *e.g.*, *U.S. v. Philip Morris USA Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009) (noting that "the contrasting terms 'means' and 'includes' … distinguish exhaustive from non-exhaustive definitions"); *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934) ("where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."); *Groman v. Commissioner of Internal Revenue*, 302 U.S. 82, 86 (1937) ("when an exclusive definition is intended the word 'means' is employed … whereas the word here used is 'includes'.").

defined term.[16] Eliminating any potential ambiguity on this point, Congress expressly states that "any" provider of telecommunications services is included in the definition—except the one thing it excludes. Thus, section 3 equates the two terms and thereby confirms that the two terms are synonymous. The exception (of aggregators), as it were, proves the rule (that telecommunications carriers = providers of telecommunications services).

D. The Commission and the courts have acknowledged that all non-aggregator providers of telecommunications services are telecommunications carriers within the meaning of section 3(44).

The plain language does not allow the possibility that there could be (other than an aggregator) some sort of "provider of telecommunications services" out there that is not a telecommunications carrier. Any entity that is both (a) a provider of telecommunications services and (b) not an aggregator is—*by definition*—a telecommunications carrier under section 3(44). This is a matter of plain meaning, not interpretation. Both the Commission and the Federal courts have recognized that the terms "telecommunications carrier" and "provider of telecommunications services" (other than aggregators) are coextensive terms.

As the Commission stated in the Local Competition Order's discussion of the interconnection obligations under section 251, the Commission states that "[a] 'telecommunications carrier' is defined as 'any provider of telecommunications services ….'"[17] Accordingly, the Commission concluded that "to the extent a carrier is engaged in

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[16] *See*, *e.g.*, *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 180-81 (2003). *See generally* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION at § 47:7 (7th ed. 2007).

[17] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order* at para. 992, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (1996) ("Local Competition Order"). *See also In the Matter of Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order at para. 22, 13 FCC Rcd 6293 (1998) (stating that "[a] telecommunications carrier, as defined by the Act, is 'any provider of telecommunications services'...").

providing for a fee domestic or international telecommunications … the carrier falls within the definition of 'telecommunications carrier.'"[18]

Likewise, as the Supreme Court noted in *NCTA v. Brand X*, "'[t]elecommunications carrier[s]'—those subjected to mandatory Title II common-carrier regulation—are defined as 'provider[s] of telecommunications services.'"[19] Conversely, as the 9th Circuit noted in *AT&T Corp. v. City of Portland*, "[a] provider of telecommunications services is a 'telecommunications carrier' …."[20] The *only* exception is that aggregators are providers of telecommunications services but not telecommunications carriers. As the DC Circuit stated in *Virgin Islands Telephone Corp. v. FCC*, "'any provider of telecommunications services,' except for 'aggregators' of such services, is designated a 'telecommunications carrier.'"[21] Because ILECs are not aggregators, ILECs do not fall within this sole exception.

E. The bottom line: Legal contortions cannot create a right where none exists.

As the preceding discussion shows, section 224(a)(5) expressly excludes ILECs from the definition of "telecommunications carrier" and telecommunications carriers are the only parties to whom utilities are required to provide pole attachment access, per section 224(f). Under section 3(44) of the Communications Act, incorporated by reference into section 224(a)(5), ILECs are telecommunications carriers because they are providers of

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[18] Local Competition Order at para. 992.

[19] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005) (quoting 47 U.S.C. § 153 (44)) (modifications indicating plural of "carrier" and "provider" in original)).

[20] 216 F.3d 871 at 877 (9th Cir. 2000) (citing 47 U.S.C. § 153(44)). *See also US Telecom Ass'n v. FCC* 295 F.3d 1326, 1328 (DC Cir. 2002) ("The Act defines a 'telecommunications carrier' as 'any provider of telecommunications services'") (quoting § 153(44)); *State of Iowa v. FCC*, 218 F.3d 756, 758 (DC Cir. 2000) ("'Telecommunications carrier' is defined as 'any provider of telecommunications services'") (quoting § 153(44)).

[21] *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 923 (DC Cir. 1999) (citing § 153(44)). *See also Mountain States, Inc. v. State Corporation Cmm'n of Kansas*, 966 F.Supp. 1043 (D. Kan. 1997) ("A 'telecommunications carrier' is defined as any non-aggregator provider of telecommunications services.") (citing § 153(44)).

telecommunication services, making those two terms interchangeable and coextensive. Thus, by excluding specifically ILECs from the definition of "telecommunications carrier" in section 224(a)(5), Congress also specifically excluded them from the term "provider of telecommunications services" in section 224(b) as parties for whose pole attachments the Commission is directed to adjudicate disputes over rates, terms and conditions. ILECs thereby have no basis to argue that section 224(b) gives them rights to rates, terms and conditions of access to utility poles. Congress spoke clearly. There is no "gap" in the statutory language for the Commission to fill.

II. There is no policy rationale for pretending that ILECs *should* have rights that section 224 clearly does not provide.

When originally enacted, the Pole Attachments Act of 1978 included two opposite groups of entities: (1) attachers, a group which was, until 1996, limited to "cable television operators;" and (2) pole owners, i.e., "utilities."[22] The term "utility" meant—and still means—both electric and telephone utilities. The provision was intended to facilitate expansion of an "infant" cable television industry.[23] The Telecommunications Act of 1996 did nothing to bridge the statutory divide between attachers and utilities. The 1996 Act expanded section 224 to encompass pole attachments by *competitors* to ILECs, but did not grant pole attachment rights to ILECs themselves.[24]

Today, ILECs are both pole owners and competitors of cable companies and competitive local exchange carriers. The ILECs make no attempt to hide the fact that they are

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[22] *See* 23 CONG. REC. at 35006 (1977), comments of Rep. Wirth ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.").

[23] H. Rpt. 104-204 at 91 (stating that "[t]he beneficial rate to cable companies was established to spur the growth of the cable industry, *which in 1978 was in its infancy*") (emphasis added).

[24] The purpose of the amendments was "to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment." S. Rpt. 103-367 on S. 1822, Communications Act of 1995 (July 24, 1995) (emphasis added). Prior to the passage of the 1996 Act, "the telephone companies," of course, could only mean the ILECs. Thus, it is clear that Congress intended to provide pole attachment rights to the ILECs' competitors, not to the ILECs themselves.

pole owners and, indeed, they boast of it.[25] Nearly half of their comments in this proceeding are devoted to protecting their interests as pole owners *against* their competitors who seek access access to their poles.[26] As the Commission found in the FNPRM in this proceeding:

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[25] FNPRM Proceeding, Comments of Qwest Communications International, Inc. (formerly the Bell operating companies held by U.S. West Communications) at 2 (filed Aug. 16, 2010) ("Qwest is both a significant pole owner and attacher. Currently, Qwest owns or jointly owns approximately 970,000 poles …. Over 500 entities, including competitive local exchange carriers and cable providers attach to nearly 700,000 Qwest-owned poles. Qwest has been providing access to its poles for years and, as both an attacher and an owner, Qwest has been successful in negotiating contracts and addressing any poles related issues on a contractual and commercial basis as best it can under the existing regulatory framework."). More than half of Qwest's comments address utility concerns. Qwest is the successor to the former Bell Operating Companies held by U.S. West Communications.

[26] ILEC comments show that they are pole owners and are eager to defend their interests as pole owners for the foreseeable future. For example, more than a third of AT&T's initial comments are devoted to defending the status quo or the rights of pole-owner utilities. *See* AT&T Comments, at 19-31 (filed Aug. 16, 2010) (arguing against changes to the existing enforcement processes and compensatory damages; arguing for various exceptions to the proposed make-ready timeline and for a right to challenge the "suitability" of attachments for reasons of safety, reliability, or engineering; and urging that ILECs should be indemnified for damages claims for moving third-party attachers' facilities). Likewise, almost half of Verizon's Initial Comments on the FNPRM are devoted to pole-owner concerns. *See* FNPRM Proceeding, Initial Comments of Verizon at 21-34 (filed Aug. 16, 2010) (arguing against change to current enforcement rules); at 34-40 ("The *FNPRM*'s Additional Proposals for Expediting Access to Poles Would Complicate Rather than Facilitate Access to Poles, Conduit, Ducts, and Rights of Way."); and at 43-46 ("The Commission's Current Complaint Process is Working Effectively" except that "The Commission Should Increase Penalties for Unauthorized Attachments."). *See also* FNPRM Comments of USTA at 18-25 (filed Aug. 16, 2010) (urging that any changes to the Commission's rules should only be adopted after "carefully balancing the needs of the attacher with existing obligations of the pole owner"; objecting to "rules that would impose more burdensome obligations on ILECs than on other pole owners"; and noting that "[i]n any particular jurisdiction, there are typically no more than two pole owners—the electric company, and/or the incumbent telephone company—and the identity of those entities is readily apparent"). Likewise, *see* FNPRM Proceeding, Comments of CenturyLink, at 29-45 (filed Aug.16, 2010) ("Other Federal rules governing terms and conditions of attachment are premature at best and may be unwarranted."). As fellow pole owners, the Alliance companies support the substance of the specific comments referenced above.

"In contrast to the vast majority of electric utilities or similar pole owners … incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachments."[27]

There is no rational connection between the Commission's policy goal of expanding broadband access and giving the very parties who "frustrate and delay attachments" a windfall in the form of regulated pole attachment rates. The Commission cannot reasonably pretend that the successors of the mighty Bell Operating Companies are really the struggling, "infant" industries who supposedly need a subsidy rate to be able to compete effectively. In any event, the plain language of the statute sufficiently shows that such incumbents have no attachment rights under section 224 and thus precludes the Commission from embracing the ILECs' proposal to create such rights out of whole cloth.

* * *

We appreciate your attention to this important matter.

Sincerely,

/s/Sean B. Cunningham
Sean B. Cunningham

/s/Mark W. Menezes
Mark W. Menezes

Counsel for the
Alliance for Fair Pole Attachment Rules

Enclosure

[27] FNPRM Proceeding, Order and Further Notice of Proposed Rulemaking at para. 68 (2010), as corrected on Aug. 3, 2010.

ATTACHMENT